80-734

Supreme Court, U.S.
FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No._____

SAM PENA and OSCAR NIPPER, Trustee,
Petitioner

v.

DANIEL E. O'CONNELL, Receiver for
CHAMPIONS RACQUET CLUB
ESTATES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Oscar Nipper
7654 Park Place Blvd.
Houston, Texas 77087
(713) 645-6618

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WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a controversy arising from a Chapter XI bankruptcy proceeding filed by CHAMPIONS RACQUET CLUB ESTATES, INC. DANIEL E. O'CONNELL, the receiver therein, commenced an adversary proceeding against OSCAR NIPPER, SAM PENA, WILLIAM COOK, W.H. CANTRELL and C.M. KRAUTHAMER. The questions arising therefrom are as follows:

1. Whether the Bankruptcy Court abused its discretion in entering a default judgment against NIPPER and PENA for failing to file a trial statement.

2. Whether the District Court abused its discretion under Federal Rule 60(b) in failing to grant relief to NIPPER and PENA from the default judgment entered in said bankruptcy proceedings.

INTERESTED PARTIES

DANIEL E. O'CONNELL, Receiver
OSCAR NIPPER, Trustee of the Taurus Trust
SAM PENA
WILLIAM COOK

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OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and is set forth in Appendix A, *infra* at page 13. The decision of the United States District Court for the Southern District of Texas is unpublished and is set forth in Appendix B, *infra* at page 14. The decision of the United States Bankruptcy Court for the Southern District of Texas is set forth in Appendix C, *infra* at page 15.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit was entered on June 25, 1980. A Petition for rehearing was timely filed and was denied on August 13, 1980 (Appendix D). This Petition for certiorari was filed less than ninety (90) days from the date of the order denying rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

1. RULE 16 — FEDERAL RULES OF CIVIL PROCEDURE:

PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unneccessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for

consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

2. RULE 55 — FEDERAL RULES OF CIVIL PROCEDURE:

DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or an incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served

with written notice of the application for judgment at least 3 days prior to the hearing of such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

3. RULE 60 — FEDERAL RULES OF CIVIL PROCEDURE:

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission

may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis,

audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

DANIEL E. O'CONNELL, Receiver, hereinafter referred to as RECEIVER, filed this suit for an Arrangement pursuant to Chapter XI of the Bankruptcy Act, alleging certain acts of fraud on the part of Defendants to this suit and seeking to void a conveyance of real estate under 11 U.S.C. Sec. 110(e). Two of the Defendants, C.M. KRAUTHAMER and W.H. CANTRELL, had default judgments entered against them for failure to answer RECEIVER'S complaint. The Bankruptcy Court for the Southern District of Texas entered a pre-trial order directing all parties to file trial statements, and ordering that any party failing to do so would not be allowed to offer evidence at trial. Never having received notice of this order, Defendant OSCAR NIPPER, Trustee, hereinafter referred to as NIPPER, never filed a trial statement.

The trial commenced on February 10, 1976. NIPPER was present at the trial, but was not sitting at the counsel table and did not attempt to offer any evidence. On oral motion of RECEIVER's attorney, the Bankruptcy Court entered a default judgment against NIPPER on February 24, 1976, for failure to file a trial statement. A judgment was entered against Defendant SAM PENA, hereinafter referred to as PENA, on February 25, 1976. The trial continued against WILLIAM L. COOK, JR., hereinafter referred to as COOK, the sole remaining Defendant, which ended on April 28, 1976. On October 14, 1977, the Bankruptcy Court entered a take nothing judgment against COOK; pursuant to its earlier memorandum opinion dated July 21, 1977.

ON August 15, 1977, PENA filed a motion for relief from the judgment of February 25, 1976 and, on September 27, 1977, NIPPER filed a similar motion. A hearing on these motions was held on October 17 and they were both denied on order of June 8, 1978. NIPPER and PENA appealed this order to the United States District Court for the Southern District of Texas which affirmed the decision of the Bankruptcy Court by order of

January 4, 1979. NIPPER and PENA appealed this order to the United States Court of Appeals for the Fifth Circuit, which affirmed the lower Court decision by a per curiam opinion dated June 25, 1980.

REASONS FOR GRANTING THE WRIT

1. Entry of default judgment was too harsh a remedy for failure to comply with the Bankruptcy Court's pre-trial orders.

The Bankruptcy Court's pre-trial order directed that any party who failed to file a trial statement would be barred from offering any evidence at trial. NIPPER and PENA were never advised that their failure to file a trial statement would subject them to the possibility of having a default judgment entered against them. In fact, NIPPER has continually stated that he never even received notice of the Court's pre-trial order.

Rule 16 of the Federal Rules of Civil Procedure governs pre-trial procedures. The primary function of pre-trial proceedings is to provide for an orderly and expeditious disposition of cases. While the trial Court must have some means of enforcing its judgments, ". . . the ultimate sanction of dismissal should be utilized only in the face of conduct so reprehensible that no alternative sanction would protect the integrity of the pre-trial procedures contemplated by Rule 16." *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir., 1976); *Luis C Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 419 (1st Cir., 1976); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 914 (2nd Cir., 1959); *Von Poppenheim v. Portland Boxing & Wrestling Commission*, 442 F.2d 1047, 1053-54 (9th Cir., 1971), *certiorari denied*, 404 U.S. 1039.

There is nothing in the report to show that NIPPER and PENA were guilty of anything which can be labeled as reprehensible conduct. They did not systematically and continually refuse to comply with the Court's orders. Clearly, "the integrity

of the pre-trial procedures contemplated by Rule 16" could be preserved by imposing a less severe sanction. In fact, such a sanction was contemplated by the Bankruptcy Court in its initial order.[1] Consequently, the Bankruptcy Court abused its discretion by entering a default judgment against NIPPER and PENA solely for their failure to file trial statements.

2. The Bankruptcy Court failed to conform to the requirements of Rule 55 in entering the default judgments against PENA and NIPPER.

Rule 55(b)(2) of the Federal Rules of Civil Procedure states in pertinent part:

> "...If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with **written** notice of the application for judgment at least three days prior to the hearing on such application." (emphasis added)

It is undisputed that NIPPER and PENA both entered an appearance in the bankruptcy proceedings. Furthermore, it is undisputed that the motion to enter the default judgment was entered orally and was heard on the same day on which it was made. Consequently, the default judgments against NIPPER and PENA should be null and void since the provisions of Rule 55 were not complied with.

3. There is a basic conflict between the decisions of the 5th Circuit Court of Appeals in this case with the decisions of other Circuit Courts of Appeal in similar cases.

In *Frow v. De la Vega*, 82 U.S. 552 (1872), a joint conspiracy to defraud the appellee of a large tract of land in Texas was alleged. One defendant failed to answer in the case, and a decree pro confesso was taken against him. A final decree absolute was later entered against him, from which he appealed. The

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[1]The pre-trial order stated that the sanction for failure to comply would be a bar against adducing any evidence at trial.

remaining defendants appeared and answered and prevailed in a trial on the merits. This court then held that the complaint must be dismissed as to all defendants, including the one who had defaulted. *Frow* was cited in *Davis v. National Mortgage Corp.*, 349 F.2d 175 (2nd Cir., 1965), a case coming through the bankruptcy courts. The trustee in bankruptcy filed a complaint to avoid certain transactions alleging they were a fraud on creditors. One of the defendants failed to answer and a default judgment was entered against him. Subsequently, the trustee's complaint was dismissed, and the court held that since liability would have been joint, the dismissal disposed of the case against all the defendants, including the one who had defaulted. *Frow* was also cited in *United States ex. rel. Hudson v. Peerless Ins. Co.*, 374 F.2d 942 (4th Cir., 1967), where the court held that *Frow* doctrine should logically apply to joint and several liability. Logically, the case at the bar and those just cited cannot be distinguished, except as to their final disposition. Therefore, Petitioner requests this Court to decide this matter and establish a uniform rule throughout the United States.

4. The District Court below abused its discretion under Federal Rule 60(b) by failing to grant NIPPER and PENA relief from the default judgments entered against them.

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . or (6) any other reason justifying relief from the operation of judgment."

This honorable court has stated that:

> "(Fed. R. Civ. P.) 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of common law remedial tools. In simple English, the language of the :'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable

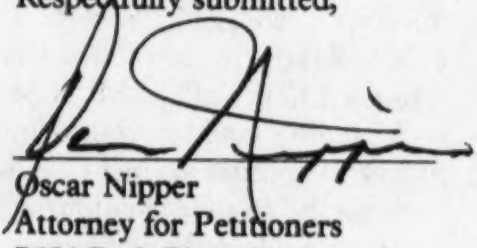
them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott v. United States,* 335 U.S. 601, 614-5 (1949).

As already noted, the Bankruptcy Court's pre-trial order stated that any party who did not file a trial statement would be barred from putting forth evidence at the trial on the merits. Under 11 U.S.C. Sec. 110(e), upon which the Reciever based his complaint, an actual existing creditor who receives an actual injury by the alleged fraudulent transfer must be shown or the Receiver's case fails. *Cameron v. Federal Auto Parts, Inc.,* 301 F.2d 867 (5th cir., 1962); *Rockmore V. Stallings,* 167 F.2d 204 (3rd Cir., 1948), aff'g 72 F.Supp. 172 (D.M.J., 1947). That no such creditor could be found is evidenced by the take nothing judgment entered against COOK. There can be no difference between the relative positions of PENA, COOK and NIPPER. Thus, to enforce the judgments against NIPPER and PENA would be unjust not only as to them, but also as to COOK who would effectively be losing whatever he initially gained in the bankruptcy proceedings below.

PRAYER

Upon consideration of Petitioners' argument, Petitioners pray for this honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to correct the abuses of discretion committed by the Court below, and the injustices which have been suffered to Petitioners herein.

Respectfully submitted,



Oscar Nipper
Attorney for Petitioners
7654 Park Place Boulevard
Houston, Texas 77087

Exhibit "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1242

In the Matter of: CHAMPIONS RACQUET CLUB ESTATES, INC., Debtor

SAM PENA & OSCAR NIPPER,
Trustee,

Appellants,

versus

DANIEL E. O'CONNELL,
Receiver,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(June 25, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir, 1970, 430 F.2d 966.

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF	x	CLERK,
CHAMPIONS RACQUET	x	U.S. DISTRICT COURT
CLUB ESTATES, INC.,	x	SOUTHERN DISTRICT
Debtor	x	OF TEXAS
	x	FILED
DANIEL E. O'CONNELL,	x	JAN 4 1979
RECEIVER,	x	
Plaintiff,	x	V. BAILEY THOMAS,
	x	CLERK
v.	x	BY DEPUTY:
	x	
SAM PENA,	x	CIVIL ACTION NO.
ET AL,	x	H-78-1077
Defendants	x	
	x	
	x	

ORDER

This case is before the court on appeal from a Bankruptcy Judge decision pursuant to Bankruptcy Rule 801. By order dated June 8, 1978, the Honorable Bankruptcy Judge John Blinn entered an order denying the motions for relief from judgment filed by Defendants Sam Pena and Oscar Nipper, Trustee (Defendants). Defendants appeal from such order. This court is of the opinion that Defendant's appeal has no merit, and therefore affirms the decision of the Bankruptcy Judge. It is

ORDERED that the decision of the Bankruptcy Judge denying motions for relief from judgment is hereby AFFIRMED.

DONE at Houston, Texas, this 4th day of January 1979.

United States District Judge
(Ross Sterling)

Exhibit "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF	x	
	x	
CHAMPIONS RACQUET	x	
CLUB ESTATES, INC.	x	BANKRUPTCY NO.
	x	73-HB-290
DEBTOR	x	
	x	
DANIEL E. O'CONNELL,	x	ADVERSARY A
RECEIVER	x	
	x	
Plaintiff	x	
	x	
v.	x	
	x	
SAM PENA, WILLIAM L.	x	
COOK, JR., C.M.	x	
KRAUTHAMER, OSCAR	x	
NIPPER, TRUSTEE, and	x	
W.H. CANTRELL, JR.	x	
	x	

Defendants

JUDGMENT

BE IT REMEMBERED that on the 10th day of February, 1976, the above styled and numbered cause was set for trial and all parties appearing with counsel announced ready and proceeded to trial before the Court.

Interlocutory default judgments having previously been entered against Defendants C.M. Krauthamer and W.H. Cantrell, Jr., Plaintiff moved for a default judgment against Oscar Nipper, Trustee, for failure to comply with the pretrial order which judgment was granted. Defendant Pena stated he had no defense to the Plaintiff's complaint. A judgment against

Defendant Sam Pena was entered. Evidence was presented by Receiver on February 10th and subsequent days in that week. The case was continued until April 26, 1976, when Defendant Cook presented his defense on that day and two subsequent days. Motions for Judgment were filed by Plaintiff and Defendant Cook which were heard at oral argument.

The Court after considering the pleadings, hearing the evidence, the argument and briefs of counsel is of the opinion that Plaintiff take nothing by way of his complaint against Defendant, William L. Cook, Jr.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff take nothing against Defendant, William L. Cook, Jr., and that all costs of Court are taxed against the Plaintiff for which let execution issue in the event same are not paid.

SIGNED this the 14th day of October, 1977.

United Stated Bankruptcy Judge
(John Blinn)

Exhibit "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1242

In the Matter of: CHAMPIONS RACQUET CLUB ESTATES, INC., Debtor

SAM PENA & OSCAR NIPPER, Trustee,
Appellants,

versus

DANIEL E. O'CONNELL, Receiver,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

(Unit A)

ON PETITION FOR REHEARING
(August 13, 1980)

Before GOLDBERG, GARZA, and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge
(Thomas Reauley)

I Oscar Nipper, a duly admitted member of the Bar of the Supreme Court of the United States, hereby advise that a true and correct copy of the foregoing Petition ofr Certiorari was deposited in the United States Mail addressed to the Clerk of the Supreme Court of the United States on the 19th day of September, 1980.

Oscar Nipper

Before me, the undersigned authority, personally appeared Oscar Nipper, and on his oath deposed and stated that he is the person whose name is subscribed to the foregoing motion and that the statements therein are true.

NOTARY PUBLIC
WALTER M. REAVES JR.
Notary Public, State of Texas
My Commission Expires, 4/07/84

CERTIFICATE OF SERVICE

On the 19th day of September, 1980, a true and correct copy of the above and foregoing instrument was mailed to the following persons by United States Certified Mail, return receipt requested, with sufficient postage thereon:

Mr. Paul Lawrence
711 Fannin No. 216
Houston, TX 77002
Certified No. 6108766

Mr. James Taylor
2100 West Loop South
Suite 727
Houston, TX 77002
Certified No. 6108768

Mr. Thad Grundy
2110 Tenneco Building
Houston, TX 77002
Certified No. 6108767

Oscar Nipper